No. 10258

In the United States Circuit Court of Appeals

For the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY,
a corporation, Appellant

vs.

RETA D. MILLER, and WARREN D. MILLER, MARCIA M. MILLER, Minors, by Reta D. Miller, Guardian, Appellees

APPELLEES' BRIEF

Upon Appeal from the District Court of the United States for the District of Oregon

HON. CLAUDE McCOLLOCH, Judge

GEORGE NEUNER,
Masonic Building,
McMinnville, Oregon

GEORGE WM. NEUNER,
Supreme Court Building
Salem, Oregon

Attorneys for Appellees.

SUBJECT INDEX

TABLE OF CASES

TABLE OF CASES—Continued

STATUTES AND OTHER AUTHORITIES CITED

In the United States Circuit Court of Appeals

For the Ninth District

NEW YORK LIFE INSURANCE COMPANY, a corporation, Appellant,

vs.

RETA D. MILLER and WARREN D. MILLER, MARCIA M. MILLER, Minors, by Reta D. Miller, Guardian, Appellees.

No. 10258

APPELLEE'S BRIEF

Upon Appeal from the District Court of the United States for the District of Oregon

---

HON. CLAUDE McCOLLOCH, Judge.

STATEMENT OF FACTS

The appellees, are the widow and two minor children of Warren L. Miller, deceased. Decedent was a farmer residing near McMinnville, Oregon, and was insured by the New York Life Insurance Company, the appellant herein.

The quarter annual premiums on the two Life Insurance policies held by the decedent (Pl. Ex. 1 and 2. Tr. ps. 93-116) became due and payable on October

17, 1940, in the sums of $28.62 and $20.10 respectively. The aggregate amount of both policies being the sum of $48.72.

A. E. Yount, for 16 years a duly licensed soliciting agent of the appellant, and had known the decedent, Miller for 18 or 20 years; "when he was in grade school. I was Y. M. C. A. secretary and he was in camp with me when he was in Bridgeport," (Tr. p. 134) He had solicited and sold to Miller the two life insurance policies involved herein, in the appellant company.

Yount called as a witness on behalf of the appellees, at the trial, said he called on Warren L. Miller, on November 13, 1940, while on a tractor plowing on his ranch about 3 miles northeast of McMinnville, Oregon, for the purpose of delivering a policy in the appellant company on the life of Warren D. Miller, one of the appellees, and son of Warren L. Miller.

"The Court: There are two other policies in this case. This explains how this gentleman happened to go to see him that day."

"The witness: Then when we fixed up and arranged for the policy for the boy, his son, then I said to him, '*Now don't forget that your own policies—you must mail us your check by the* 17*th.*' 'Well,' he said, 'I will give you a check for it now if you know how much it is'."

"The Court: You were talking to him on Wednesday, the 13th?"

"A. I was talking to him on the 13th. I am not sure of the day, your Honor, without looking it up on the calendar, but it was on the 13th day of November, because that is the boy's birthday. So he said, 'I will give you a check for it now if you know the amount'. So *I told him the amount*, and so he started to write the check and I said, '*Make the check to the company*.'_ He made the check to the company and he gave it to me I noticed that *the amount was correct* and *was made to the company*, and otherwise than that I paid no attention to him—I paid no attention to it. *I don't recall that I gave a receipt for it at the time.*" (Tr. p. 142).

"The Court: Go ahead now."

"A. That pretty well closed the incident. He got on the tractor and went to work, I came back to Portland and *I turned the check over to the cashier's office and asked that receipts be mailed.*"

"The Court: That afternoon?"

"A. *That afternoon, yes, sir.*" The receipts referred to (Df. Ex. 10 and 11 Tr. p. 182 and 183), were not mailed until November 18th.

The check was postdated November 17, 1940, paying to New York Life Insurance Co. for $48.72, and

delivered by Yount to the cashier, R. A. Durham, in charge of Appellants Oregon branch office, in Portland, between 3 and 4 o'clock on the afternoon of the same day, which was held, by the cashier or the Oregon branch office until November 18, 1940, when it was endorsed and deposited to the credit of the appellant company in the U. S. National Bank of Portland, Oregon.

Mr. Durham called as an adverse witness by the plaintiff testified that he had been the cashier for the New York Life Insurance Co. in Portland, Oregon. About 19 years, in charge of its Oregon branch office.

"A. Well, in charge of the part that the cashier is in charge of; that is the clerical force."

"Q. I wish you would just briefly narrate to the jury what the duties of the cashier are in connection with the office."

"A. Well, I have charge of the office force. Our work is to *collect premiums and transact different matters that come up with policyholders and with our agents.*"
(Tr. p. 89).

"Q. Well, what I am getting at is this: Now if I send you my check in payment of a premium you receive that check tomorrow, you mail that receipt, or do you wait until the check is returned to see whether it

is good or not before you issue the official receipt?" (Tr. p. 90).

"A. No, we don't wait to find out if this check is good before we mail the receipt. If we received a remittance from somebody today we might not get at that maybe until the next day."

"Q. But the general policy is that on receipt of the check the receipt goes forward in acknowledgement thereof?"

"A. *Yes; if the premium is paid within the grace period and is paid in full.*" (Tr. p. 91). The check reached the bank at McMinnville, Oregon, upon which it was drawn on November 20, and was returned to the Portland bank on the 22nd, and on November 25th or 26th it reached appellants Oregon branch office located about 5 blocks from the bank, and was returned by registered letter, of the cashier on that day, addressed to the decedent, McMinnville, Oregon, enclosing the check. (Pl. Ex. 3 Tr. ps. 117 to 119). This letter was not received by Mrs. Miller until the 28th day of November, 1940, the day after, the insured was mortally injured.

On the same day, November 28, Reta D. Miller, wife of the insured obtained a U. S. Money Order, for $49.07, payable to New York Life Insurance Co. (Pl. Ex. 8c Tr. 127) which according to her understanding

was a compliance with the request of appellant's letter, (Pl. Ex. 3 Tr. 124) returning the unpaid check to cover the amount of the check plus, the interest thereon, and in her own words to make the check good:

"Mr. Neuner. Q. I hand you now Plaintiff's Exhibit 3 and ask you to tell the jury whether or not that was a letter received by you?" "A. Yes, it is."

"Q. Now then, when you stated that you got the money order, what they asked for, what did you mean?"

"A. Well, *I meant I wanted to make the check good.* I immediately got a money order and *paid the check.*"

"Q. And I will ask you to tell the jury whether or not that was in compliance with that letter."

"Mr. Davis: If the Court please——"

"A. That was the way that I read it."

"Mr. Neuner. Q. Yes. In other words, there is where you got the amount, the suggestion for the $49.07; is that correct?" "A. $49.07, with interest." "Q. You mailed that when?" "A. November 29th-28th." "Q. The date you received it?" "A. The day I received this I went uptown in the afternoon."

"Q. Now from the time that your husband was injured where was he until the time of his death?"

"A. He was in the General hospital in McMinnville."

"Q. Did you see him during that time?" "A. I

saw him. I didn't talk to him."

"Q. Why?" "A. Well, he was in an unconscious condition and he didn't talk to anyone either——"

"The Court: Injured on the 27th and passed away on what day?" "A. December 3rd."

"Mr. Neuner: The 3rd."

"The Court: December 3rd.'

"Mr. Neuner: Q. Now then, that money order was returned to you?" "A. After his death."

At the conclusion of testimony, defendant moved the court to direct the jury to return a verdict in its favor, on the general ground that there was no evidence that the premiums on the policies had been paid when due, or during the grace period, and that there was no evidence binding on defendant of any agreement as to accepting the postdated check as unconditional payment of the premiums.

The court denied the motion and error is assigned.

The Court submitted the case to the jury on two controlling questions of fact, (1) was the check given by Warren L. Miller, insured, on November 13th, 1940, and postdated November 17th, 1940, for $48.72, accepted by the appellant, as payment of the premiums, on the policies which came due on Oct. 17th, and (2) did the cashier R. A. Durham, in charge of the branch office of the appellant in Portland, Oregon, have au-

thority, to bind the appellant, in accepting the post-dated check as payment.

The jury returned a verdict finding the issues in favor of plaintiffs, declaring both life insurance policies in full force and effect on December 3rd, 1940, the day that the insured died, and fixing the sum of $1,000.00 as reasonable attorney's fees to be allowed to the appellees.

THE CONTESTED ISSUES

Appellant contends that there are four main contested issues in this case, (1) in the admission of testimony pertaining to acceptance of the check in payment of the premiums, (2) denying appellants motion for a directed verdict, (3) refusal to give appellants requested instructions and, (4) erroneously instructing the jury as to the law.

ERRORS RELIED UPON BY APPELLANT

Appellant's brief, specifies and recites nine specifications or errors (pp. 10-20) Nos. 1 to 5 are considered under one argument (pp. 21-27) and pertain to the introduction of testimony; No. 6 deals with the denial of the motion for a directed verdict; specifications Nos. 6, 7 and 8, criticize the instructions given by the Court and No. 9 alleges error in the Court's refusal to give requested instructions.

ARGUMENT

Appellant's Specifications of Errors 1 to 5

Appellant has chosen to treat its assignments of errors 1 to 5 under one head, but have cited only two authorities in support thereof, one, Sec. 2-226 O. C. L. A. which is but a statement of the basic rule on the admissibility under the state practice, the other reference merely cites 20 Am. Jur. wherein the general rule of the admissibility of evidence is reiterated.

POINTS AND AUTHORITIES

I.

The admissibility of evidence in federal courts is now, and has been for sometime, governed by the federal rules of civil procedure. Rule 43 is as follows:

> "(a) FORM AND ADMISSIBILITY. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prscribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner."

The mere fact that given evidence is not admissible under the state practice, will not deny its admissibility in

federal courts.

Aetna Life Ins. Co. vs. McAdoo, 106 F (2d) 618 (1939)

Rule 61, of Federal Rules of Procedure, provides, in substance that error in the admission of evidence shall be disregarded unless such admission is "inconsistent with substantial justice", and errors which do not affect the substantial rights of the party litigant, are to be disregarded.

Appellant has failed to point out, or demonstrate in what manner its substantial rights were affected by the admission of the evidence complained of, and it is clear that there was no error in the introduction of such evidence.

We could well end our answer to the contention on the admissibility of evidence here, but being zealous of the duty we have to perform to our clients, we offer the further authorities for admissibility of such evidence.

In spite of the silence of the appellants, we are concerned with a *postdated check*. The Negotiable Instrument Law, Sec. 12, 69-112 O. C. L. A. provides, that an instrument shall not be invalid for the reason only, that it is antedated or postdated, provided, this is not done for an illegal or fraudulent purpose. It was thus incumbent upon the appellees to prove as a part of their case, that the insured acted in good faith in giving the postdated instrument. The fact that he thought he had sufficient money credited to his account in the bank is evidenced by his notation and subtraction on his check stubs, (Pl. Ex. 6, Tr. p 162) and

this was certainly competent evidence, that he acted in good faith.

The appellant claims error in the admissibility of the check stubs, on the additional ground that it was not shown to have been made "at or about the time of the issuance of the check". The insured's lips are sealed, of course, by death, and Agent Yount, who was the only person present at the time the check was written, testified that the insured "had a check book with him", (Tr. p. 142), but that he didn't know whether the insured made any entries in the stubs (Tr. p. 147). Mrs. Miller testified that the stub's writing was in her husband's hand (Tr. p. 159). When the appellees sought to introduce evidence as to the policy of the insured with reference to keeping his stubs up to date, appellants objected (Tr. p. 157), the appellees did not pursue the inquiry. How, now, can the appellant be heard to object to this evidence on the ground that it was not shown that the entries were made at the time that the check was made, when they objected to the introduction of an evidence as to the manner of making entries, or more properly, the insured's habits with reference thereto? This evidence so offered was the only evidence as to the entries available on the question of good faith. The acts of the appellee, Mrs. Miller, in sending the post office money order was also clearly admissible on that score.

In National Life Co. vs. Brenneke (Ala.) 115 S. W. (2d) 855-860 (1938), the insured had sent the insurer, a

neighbor's check during the last days of the grace period. The company issued an unconditional receipt immediately upon receipt of the check. The check was not paid, returned to the insured together with an application for reinstatement. Upon receipt of this notice, insured sent a money order without the application for reinstatement. The insured then went to a company physician, but his application for reinstatement was rejected. He died four months later. In affirming a judgment for the beneficiary, the court on page 860, held:

> "As evidence of good faith, the insured immediately upon notice that the check had been dishonored, he procured and forwarded to the company a post office money order for the amount of the premium."

In the case at bar, the insured was mortally injured when notice came by mail that his check had been dishonored, but did not his widow do the same thing as the insured in the Brenneke case, supra?

The doctrine of the Brenneke case has been, and now is the law of Oregon enunciated in the case of Bergman and Berry vs. Twilight, 10 Or. 337, wherein the court held that where good faith of a sale or contract was involved, all that was done by the parties which tends to *illustrate, explain, or elucidate the character of the transaction, is admissible.*

It is appellees position from the time Agent Yount came to the insured's ranch until the time insured died, the transaction was but one, or more legalistically, it was a contin-

uous transaction.

Appellants say:

> "If the check was accepted as plaintiffs contend, the act of acceptance was completed when the defendant accepted the check, if it did. Anything that transpired subsequent to the return of the dishonored check to the insured would have no bearing upon the question in dispute". (Tr. p. 27).

It is not pointed out where the line of demarcation is. The appellant introduced its entry made after or simultaneously with the return of the check (Df. Ex. 22, Tr. p. 201). Likewise the appellant introduced in evidence, its check in payment to the bank for the dishonored check (Df. A. Ex. 15, Tr. p. 196) signed by R. A. Durham, "Cashier, Oregon Branch Office".

It is submitted that all of the evidence forming the basis for appellant's assignment of errors Nos. 1 to 5 inclusive, was also admissible as a "part of the res gestae of the transaction."

> See Lake County Pine Lbr. Co. v. Underwood Lbr. Co. 140 Or. 19, 12 P. (2d) 324 (1932)

But assuming, that there was error in the admission, it was harmless and cured, by the court's instruction as to the evidence forming the basis for error No. 1, (Br. p. 100) being the testimony of Agent Yount. The court instructed:

> "As to the part that Yount played, who picked up the check out at Miller's place, I instruct you, gentlemen, that, what he did could not bind the company. He served, as I view it, as the intermediary whereby Mr.

> Miller's check was brought to the company. Only what the company did with the check after it came to the cashier's office could bind the company. * * * ". (Tr. p. 229).

The evidence forming the basis for specifications Nos. 2, 3, 4, and 5, (Br. pp. 11 and 12) were referred to by the court in its instructions in the following language:

> "Now, as to that payment by her, gentlemen of the jury, that is just one of the later circumstances in this case. That does not bear on the controlling questions in the case" etc. (Tr. p. 230.

We, therefore, submit, that there is no merit in the appellant's specifications of errors Nos. 1 to 5 inclusive.

ARGUMENT

Appellant's Specification of Error 6

In the argument of this assigned error, appellants cited numerous cases under two propositions of its concept of the law governing the cases. Appellees do not agree with its statement of the law, and in support thereof, we attempt to analyze appellant's authorities cited by them. No. 1 on page 28 of its Brief.

The first case, that of Smith vs. Mills, 112 Or. 496, involved the sale of a note and mortgage to the defendant, whose agent was the vice-president of a bank, and who as such vice-president, drew a cashier's check in favor of the plaintiff as consideration for the assignment of the note and mortgage. The bank failed before the plaintiff had an opportunity to present the check. Although the court

cited many cases and discussed the rules of law relating to payment, on page 504, it said:

> "We do not find it necessary to reconcile the conflict, nor to announce a rule as to what the presumption of payment is, in cases like those cited by respondent:" etc.

The case turned on the fact that the defendant's agent knew, or should have known, that the check was worthless. At page 507 it said:

> "Both parties here are innocent. But it was respondent's agent whose conduct caused the loss. He converted her good money into a bad check, by which to pay her debt. Though innocent herself, she must bear the loss of her agent's dereliction:" etc.

We cannot see wherein this case is applicable to the principle contended for by the appellant. It certainly is no authority in support of any such proposition.

In Johnson vs. Inkovitz, 57 Or. 24 110 Pac 398, was involved no question of insurance, but rather the application of a rule of sales, as to when title passes to goods which are the subject matter of a cash sale. Although the case has no bearing on any of the issues of the instant case, but it may be pointed out that the announcement by the court has been severely criticized.

> 3 Williston on Contracts (Rev. Ed.) (1936)
> Sec. 732 pp 2079-2082.

Furthermore, this case is of doubtful authority in the light of the Uniform Sales Act. See Secs. 71-118-119 O. C. L. A.

The statement of facts involved in Seaman vs. Muir, 72 Or. 583, 144 Pac. 121, cited by the appellant would only incumber this brief. However, as stated by the court on page 589,

> "* * * the whole scheme was an abortive attempt to perpetuate the transaction of the sale (auction of a defunct railroad's assets) until the money should arrive * * *".

The court did utter a dictum, which is quoted on page 32 of appellant's brief, but as the court said:

> "That the notes and cashier's check were not intended as payment of any sum of money to the bank is conclusively shown by the undisputed fact that the bank retained the possession of the check and did not negotiate it."

Texas Mut. Life Ins. Assoc. vs. Talbert, 134 Tex. 490, 136 S. W. (2d) 584 (1940), although cited by appellant, in support of the proposition that there must be an "agreement to accept the check as unconditional payment" in order to make a check payment of a premium, stated the rule, thus:

> "Moreover, this rule (conditional payment by giving of a check where antecedent payment is involved) extends as well to transactions falling within the purview of insurance law, which contemplates that insurance premiums are ordinarily to be paid in cash, and that *in the absence of a definite intention or agreement*, the giving of a check therefore, will not operate as payment." (Emphasis ours.)

The company in this case was not a legal reserve company, but was an assessment institution, and the basis of

the forfeiture here was the failure to pay an assessment upon the death of one of its members, and an ordinary check was involved.

Appellants next contend that "the burden is upon the person claiming that a check was accepted as payment to prove an agreement to accept the check as payment by clear and satisfactory evidence" (Br. p. 29). Appellees except to this statement of the law in this state. The sole Oregon case cited by the appellant in support of this proposition is Joppa vs. Clark Comm. Co., 132 Or. 21, 281 P. 834 (1929) which involved a check given in payment of a quantity of hogs shipped by the plaintiff to the defendant. The court states the rule as to payment where a debt is involved and concludes at page 27.

> "We find no substantial evidence in the record that the check in question was accepted by plaintiff as payment or requiring that issue to be submitted to the jury. Neither the testimony on behalf of defendants nor the circumstances attending the transaction indicates such an agreement, *or to overcome the prima facie presumption that the check was taken merely as conditional, not absolute payment.*" (Emphasis supplied.)

Therefore, the Joppa case does not sustain the appellant's contention. In that case, the court spoke of "presumption of conditional payment" which is something other and different from a requirement that there be an agreement to accept the check as unconditional payment. Likewise, we fail to find a statement in the Joppa case that there must be "clear and satisfactory evidence" in order to establish

payment. It is settled that a mere preponderance of the evidence will satisfy the affirmative of an issue. The Oregon Supreme Court has held that in the case of fraud, that there was no error in instructing a jury that the evidence must be "clear and satisfactory".

Metropolitan Casualty Ins. Co. vs. N. B. Lesher Inc., 152 Or. 161, 52 P. (2d) 1133 (1935).

As the appellees see it, the Oregon courts have not exacted such a degree of proof in cases not involving fraud, and further in support of this rule, it has been expressly held that it is error to instruct a jury that it is incumbent on a party litigant to establish the fact of payment "by clear and satisfactory evidence", as such an instruction negatives the idea that a mere preponderance is sufficient to warrant a finding of payment.

Meyer vs. Hoffemeister, 119 Wis. 539, 97 N. W. 165, 100, A. S. R. 900.

Turner vs. New York Life Ins. Co. (CCA8) 100 F. (2d) 193, (1938), is also cited and quoted by the appellant. Based upon the facts therein stated, the result is sound. The court could have stated the facts more fully. As appellants point out, the insured utilized the remaining loan value on his policy, and gave the insurer a check for the balance of the premium, stating that he did not have sufficient funds in the bank to meet the check, but that he would have in a few days. The check was dated May 1, and from the statement of facts, it was currently dated. The "loan agree-

ment was forwarded to the New York office for approval" and the check was held until May 7, and then deposited. The check was dishonored and prompt notice was given the insured. The check was again deposited and was again returned, n. s. f. On May 15, it was returned to the insured by registered mail. The insured knew of the letter, but made no attempt to take it out of the post office, or to inquire of the insurer as to its contents. The insured died on June 11. The court stated the rule, as quoted on page 38 of appellant's brief, but it is clear from the following excerpts of the case that the court considered other elements therein in making its decision, for on page 194 thereof, we find:

> "The company gave the plaintiff and the insured two opportunities to make good the condition and upon failure so to do, promptly declared a lapse of the policy".

Again on the same page, we further quote:

> "* * * the reason the letter did not reach her was because of her own negligence in not calling at the post office for it when she knew that a registered letter from the company awaited her."

Although the identical appellant company was there involved, it cannot be said that the insured in the instant case, or his widow and minor children got the same consideration that the company accorded the insured in the Turner case. As, stated above, we have no quarrel with the Turner case, but the courts holdings and rulings must be considered along with the facts befor it. Further, the

fact that the loan agreement was not completed at the time the check was given, would lead to the assumption that the transaction was not to be closed until the 7th of the month, at which time it was contemplated that the loan agreement would have received the approval of the New York office.

In Central States Life Ins. Co. v. Johnson, 181 Okla. 367, 73 P. (2d) 1152, the insurer received a check from the insured on the next to the last day of grace, December 15, being the last day. The insured's account was credited and a conditional receipt was issued. The check went through the regular channel, but was dishonored, notice of which was given by the insurer. Insured was notified that he was privileged to seek reinstatement of his policy, which was stated to be lapsed. The insured's application for reinstatement was denied by a letter under date of December 31. He suffered permanent total disability on January 29. The court denied recovery to the insured.

Preceeding the lengthy quotation made on page 39 and 40 of the appellant's brief, the Oklahoma court on page 1154 stated:

> "The insurer may ordinarily demand cash in payment of a life premium, in the absence of a contrary intention on the part of the insurer, a personal check does not operate as payment".

The result of that case is sound, when it is taken into consideration that simultaneously with the receipt of the check, the insurer issued a receipt *conditioned upon* prompt

payment of any instrument tendered in payment. Further, an ordinary check was involved. The courts analysis of the law as appears from the quotation made by appellants more nearly approximates the true rule than any of their other cases we have discussed.

Naylor v. Ill. Bankers Life Assur. Co., 134 S. W. (2d) 115, next cited by appellants. This was an action to recover premiums paid to the company on the ground that it had wrongfully declared a forfeiture of the policy. Here again the company issued a conditional receipt simultaneously with a receipt of an ordinary check. It is true, as appellants contend, that the insured upon notification of dishonor of the check, sent a money order to the company, and upon return of the money order, sent a cashier's check, which was also returned. The court in denying recovery, said:

> "We think the receipt on its face was notice to appellant that the check was accepted on condition that it be paid when presented to the drawee bank, and was not received and accepted by appellee in payment of the premium".

Hare vs. Connecticut Mut. Life Ins. Co., 114 W. Va. 679, 173 S. E. 772, is next cited by the appellant, but this case is not discussed or quoted in its brief. The Hare case involved a check given to the "local agent" who in turn forwarded it to the general agent. The check was given after the expiration of the grace period. In stating the facts, the court said:

> "He immediately wrote to the insured that the check had been protested. The insured did not answer the letter or make the check good."

Great Southern Life Ins. Co. vs. Brooks, 166 Okla. 163, 26 P. (2d) 430, is another case set out in appellant's brief, but not discussed. On July 12, well within the grace period, the insured sent her husband's check for the premium, upon receipt of which, (July 14) the company issued a conditional receipt. Still within the grace period, the insurer notified the insured of the dishonor of the check. The insured did nothing. On August 1, being after the grace period, the insurer wrote sending a health certificate, and requested the insured to apply for reinstatement, and stated the amount necessary to transmit with the application. Some days later, and without replying to this letter, the insured's husband sent a bank draft, but without the health certificate. The insurer acknowledged receipt of the bank draft, and requested the health certificate. No reply was made to the letter. His wife, the insured, had been seriously ill for some weeks. She died August 13. The case, of course, is not in point, on the facts, or on the law.

The case of Philadelphia Ins. Co. vs. Hayworth, 296 F. 339 is relied upon by the appellant, and so is its companion case in 190 N. C. 757, 130 S. E. 612. These cases were likewise the basic authority relied upon by the appellant in the lower court (Tr. p. 253). A close analysis

of the facts is necessary to understand these cases. The policy therein had lapsed for nonpayment of a premium. To reinstate the policy, the insured gave a health certificate, paid $27.33 in cash, and gave the insurer 3 notes for $25.00 each, the second of which was due March 24, 1922. The notes contained no grace provision, but on the contrary, contained strong provision for forfeiture. On March 24, the second note became due, and the insurer agreed to extend payment to June 6, (date of the postdated check), upon receipt of another health certificate and a check for $25.00 postdated June 6. On June 7, the check was deposited, and the note marked paid, and sent to the insured. The check was dishonored, and notice of dishonor was given and of the lapse of the policy.

The essence of the holding of the North Carolina court is illustrated by the following quotation from 130 N. E. at page 613:

> "When a note is given for the payment of the premium in a life insurance policy, and the note and the policy contained a stipulation that, upon the failure to pay the note at maturity, the policy shall cease and determine, then a failure so to pay such premium note renders the policy void."

It is noted that the court here was concerned with whether or not the company had accepted a check in payment of the note. There was no question but that the insurer had accepted the note in payment of the premium, but it must be observed that the note itself contained *a strong forfeit-*

ure provision. The note also contained a provision that *it did not create a personal liability* on the insured; hence it is inapplicable to the facts in the case at bar, and readily distinguishable, and the case rather supports the appellees view than that of the appellant.

APPELLANT'S SPECIFICATIONS 7 AND 8

II

A postdated check is a valid bill of exchange, and is in common use in the business world. It differs from the common check by carrying on its face an implied notice that there is no money presently on deposit to meet it.

Sec. 12, Neg. Instr. Law. Sec. 69-122 O. C. L. A.
Triphonoff vs. Sweeney, 65 Or. 304, 130 Pac. 979.
33 Wds. and Phs. (Perm. Ed.) p. 123
29 Yale Law Journal, 321-325 (1919)
University of Pittsburg Law Review, Vol. 3, p. 395, (1936-1937).

ARGUMENT

The Negotiable Instrument Law, Sec. 69-112 O. C. L. A. is the only section which relates specifically to such an instrument. It provides:

> "The instrument is not invalid for the reason only that it is antedated or postdated, provided this is not done for an illegal or fraudulent purpose. The person to whom such an instrument so dated is delivered *acquires the title thereto as of the date of delivery.*"

In that connection we should not lose sight of the fact that under the terms of the insurance policies, the insured, Miller, never promised to pay the premiums, and was not

personally liable for the payment thereof. The premiums due on October 17, 1940, were not debts, nor did they become debts by the terms of the instruments due from the insured to the insurer, *nor was the relationship*, between the appellant and the insured, *that of creditor and debtor*, but after the insured gave his postdated check in payment of the premiums, he executed a valid bill of exchange, and the *insured became personally liable* to the holder thereof. A new obligation on the part of the insured not theretofore existing, was thereby created. If the check was not paid on presentation, *an action was maintainable* thereon to recover the amount thereof, whereas, *otherwise, no action could have been sustained.*

Under such circumstances, the presumption is that the postdated check was accepted in payment on delivery thereof, in payment of the premiums, by the appellant. In the *case of a creditor and debtor*, the giving of a worthless check can be said to be no payment, *because the creditor receives nothing additional for his debt*, which he did not theretofore have. Or as Williston and other authors say, no merger of a preceding debt into the check should be presumed. *But in the instant case, where no legal obligation existed* on the part of the insured to pay the premiums, the giving of the postdated check *created a valid, legal obligation which the insurer could then enforce.* Or reiterating, there is no debt to merge into the check. It thereby

acquires a right against the insured which it did not theretofore have.

The appellant acquired title to the postdated check as of the date of the delivery, which was on November 13, 1940. In that regard we must bear in mind that we are dealing with negotiable instruments.

> "A postdated check or one *which bears a date subsequent to that of its actual issue*, is payable on or at any time after the day of its date, being in effect the same as if it had not been issued until that date. 'The rule is laid down in Selover Negotiable Instruments Law, Section 18, that an antedated or postdated instrument may, of course, be negotiable *after or before the date given*, and any one to whom such an instrument is given *acquires title thereto as of the date of delivery*'." etc.
>
> Triphonoff v. Sweeney, 65 Or. 304, 130 Pac. 979.

The Triphonoff case is cited as a basis of authority upon the question of a postdated check as a negotiable instrument. This case is freely cited by leading authorities both state and federal, and accepted as the law relating thereto. A "postdated check" has also been defined thus:

> "A 'postdated' check is one delivered prior to its date, generally payable at sight, or on presentation on or after day of its date, and differs from an ordinary check by carrying on its face *implied notice that there is no money presently on deposit* available to meet it, but with implied assurance that such funds will exist when the check becomes due."
> 33 Wds. & Phs. (Perm. Ed.) p. 123, citing Lovell vs. Eaton, (1925) 133 Atl. 742-3.

In the case of Republic Life Acc. Ins. Co. v. Hatcher, 51

S. W. (2d) 922-933, the court concludes:

> "It is proven that the check was accepted by the agent as payment of the premium and the check was paid at the time it was due to an agent having the right to receive the money. *The acceptance of negotiable paper in payment of a premium is binding on the parties*, even though the contract called for a cash payment. New York Life Ins. Co. v. Evans, 136 Ky. 391, 124 S. W. 376; American National Ins Co. v. Brown, 179 Ky. 711, 201 S. W. 326; Kansas City Life Insurance Co. v. Hislip, 154 Okl. 42, 6 P. (2d) 678. *The agent had authority to collect the premium, and the acceptance of a postdated check therefor was within the apparent scope of the agency.* George Washington Life Ins. Co. v. Norcross, 178 Ky. 383, 198 S. W. 1156; Inter Southern Life Ins. Co. v. Duff, 184 Ky. 227, 211 S. W. 738; Henry Clay Fire Ins. Co. v. Grayson County State Bank, 239 Ky. 239, 39 S. W. (2d) 482; Federal Life Ins. Co. v. Warren, 157 Ky. 740, 181 S. W. 331; Globe Mutual L. Ins Co. v. Wolff, 95 U. S. 326, 24 Life Ins. Co. v. Warren, 167 Ky. 740, 181 S. W. 331; L. Ed. 387; Union Mutual Life Lns. Co. v. Wilkinson, 13 Wall. 222, 20 L. Ed. 617."
>
> "It follows that the premium was lawfully paid and the policy was in force when the insured died."

In University of Pittsburg Law Review, Vol. 3, page 359, under the title of "Insurance—Payment of Premium by Postdated check", the author in a well considered and written article, specifically analyzes the case of John Hancock Mut. Life Ins. Co. v. Mann, (CCA7) 86 F. (2d) 783, herein cited, after an exhaustive review of the authorities, sums up and concludes with the following quotation from page 362:

> "It is generally held that the acceptance of a nego-

tiable instrument in payment of an antecedent or concurrent indebtedness of prima facie only on a conditional payment. The negotiable instrument merges the antecedent or concurrent indebtedness, which will generally be revived upon the dishonor of the negotiable instrument. * * * *But in the case of insurance, there is no antecedent or concurrent indebtedness,* for the insured is not obligated to pay the premium. Consequently, *there is no basis for applying the strict rule of presumption of conditional payment to the payment of insurance premiums.*"

The Negotiable Instrument Law of the State of Oregon defines "acceptance" as follows:

" 'Acceptance' means acceptance completed by delivery or notification."

See Sec. 69-1101 O. C. L. A.

Under Section 2-407 O. C. L. A. Certain Disputable Presumptions we find:

"(11) That things in the possession of a person are owned by him."

Johnson v. Apple, 98 Or. 282, 193 Pac. 1024.

The word "acceptance" is defined by Bouviers Law Dictionary (Baldwin's Ed. 1934) as follows:

"The receipt of a thing offered by another with an intention to retain it, indicated by some act sufficient for the purpose. 2 Parsons, Contr. 221."

"IN INSURANCE. Acceptance of abandonment in insurance is in effect an acknowledgement of its sufficiency, and perfects the right of the assured to recover for a total loss if the cause of loss and circumstances have been truly made known. No particular form of acceptance is requisite, and the underwriter is not obliged to say whether he accepts; 2 Phil. Ins. Sec. 1689. An acceptance may be a constructive one, as by taking pos-

session of an abandoned ship to repair it without authority so to do;" etc.

"NEGOTIABLE INSTRUMENT LAW. 'Acceptance' means an acceptance completed by delivery or notification. Miller's Ky. Negotiable Instrument Law, sec. 190."

Much has been said by the appellant in support of its theory on the question of acceptance, and that there must be a special contract proven by the appellees with reference thereto, but appellees maintain that the appellants cannot in one breath, say that it insisted upon a strict performance of its policy, and in the next breath, permit the insured to believe that the acceptance of the postdated check continued his insurance. Such practice should not be permitted, and as was said by the late Justice McBride, in Francis vs. Mutual Life Ins. Co., 55 Or. 288, 106 Pac. 323:

"It is a practice unworthy of a great business corporation, and is commented upon by Rudkin, J., in Starr v. Mutual Life Ins. Co., 41 Wash. 228 (83 Pac. 117) in terms none too severe."

There is not a scintilla of evidence in the record, nor can an inference be drawn from any circumstance narrated therein, indicating that the agent intended to accept the check merely conditionally. It is not claimed that at the time the check was received by the cashier of the appellant's Oregon Branch Office, or from that time, until it was deposited in the bank, that there was anything said, or done, which indicated an intention on the part of the appellant, that the check was not accepted in payment of

the premiums, for the evidence affirmatively shows that no conditional receipt was issued, as was the usual practice, in such cases, at the time of the acceptance of the check (Tr. p. 91), or any notice given him whatsoever, that his policies would lapse, or become void if the check was not paid.

But on the contrary, every act and circumstance of both the Agent Yount, and the appellant's cashier of the Oregon Branch Office, as shown herein, supports the verdict, that the check was received, held and accepted in payment of the premiums.

The soliciting Agent Yount was Miller's boyhood friend and advisor. He called the insured's attention to the payment of the premiums on his policies. It is true Yount had an interest therein, yet he told Miller to "make the check to the company", in the amount which he suggested and designated. Miller did as he was told, and handed the check to Yount, which he then delivered to appellant's cashier, within two hours thereafter, and it was then held by the cashier for five days, or until the following Monday, without returning it, or notifying the insured, that it was accepted conditionally. Please bear in mind that Portland is only about 35 miles from the Miller ranch. These acts and conduct on the part of the insurer, in dealing with the insured, appellees claim waive the provisions of the policies, and at least, extended credit to the insured, a prac-

tice which is universal among insurance companies dealing with its old policy holders, and the insured was honestly led to believe that his policies were in full force, and his insurance continued for his family protection. To conclude otherwise, would again invoke the language of Justice McBride of the Oregon Supreme Court in Farley v. Western Assurance Co., 62 Or. at page 45, wherein the venerable Judge said:

> "The defense is unconscionable. Defendant sent its agent out to adjust and settle the loss, and he did settle the amount of it, and agreed that the company should pay it. He was not merely an adjuster or investigator. He had authority to settle as defendant admits. Defendant cannot send out an agent clothed with such authority and trick unsuspecting claimants into a reliance on his representation, and then repudiate them by *attempting to hide behind obscure clauses* in the policy."

While the appellees do not claim that Agent Yount had authority to accept the check in payment, yet we do claim that Agent Yount called the insured's attention to the policy premiums, received the check, and delivered it to the appellant's cashier in charge of the Oregon Branch Office in Portland, Oregon, and that act, became the act, of the appellant company. To claim otherwise would justify the language above quoted.

The court correctly instructed the jury in submitting the questions of fact, consisting of the two controlling questions, namely: The acceptance of the postdated check in payment of premiums; and, the cashier's authority so to do.

III.

A postdated check, received by an insurer, within the grace period, for the payment of a life insurance premium, which is held by the insurer for a period of five days, without notice to the insured, and until after the period of grace had expired, operates as a payment of the premium.

John Hancock Mut. Life Ins. Co. v. Mann (CCA7) 86 F. (2d) 783
Kansas City Life Ins. Co. v. Davis (CCA9 95 F. (2d) 957
Equitable Life Assur. Soc. v. Brandt, 240 Ala. 260, 134 A. L. R. 555
Olga A. Martin v. New York Life Ins. Co. (N. M.) 234 Pac. 673; 40 A. L. R. 406-423
Williams v. Emp. Liability Assur. Corp. etc (CCA5) 69 F. (2d) 285

ARGUMENT

The appellant company had the right to refuse to accept the postdated check, and insist upon an immediate cash payment within the grace period. It had time to do that from the date, of the delivery of the check, until it was deposited in the bank, a period of five days. It however, remained silent. On the other hand, it had the right to extend credit to the insured, accept the check as a promise to pay the premium, and waive the right of forfeiture. It chose the former, accepted the check which operates as a payment, and impliedly waived, thereby, a forfeiture of the policy.

The case of John Hancock Mut. Life Ins. Co. v. Mann, decided in 1936 by the Circuit Court of Appeals of the

Seventh Circuit, reported in 86 F. (2d) 785, 109 A. L. R. 775, is practically, we believe, on all fours with the case at bar. After citing several authorities, together with decisions of the United States Supreme Court, Circuit Judge Evans, speaking for the court on page 785, states:

> "In approaching this question, it is necessary to keep in mind that *the payment of a premium on a life insurance policy is optional with the insured*, who always has the privilege of terminating his insurance by not paying the premium. The consideration of a note by him given for the amount of the premium and the continuance of the life insurance policy. *Inasmuch as the execution of a note creates a liability on the part of the insured which did not previously exist*, it constitutes the consideration for the payment and satisfaction of the premium. Wherein does the execution and acceptance of a postdated check permit of a different conclusion?
>
> "Prior to the issuance of the postdated check there was no liability on the part of the insured to pay the premium. *Upon the delivery of the check there arose a legal liability on his part.* If the check were a presently due check the consideration would arise, but acceptance of such a check would be upon the hypothesis of money in the bank with which to pay the check. If there were no funds in the bank, *it would be optional with the insurer to retain the check* and enforce the liability or repudiate the effect of its acceptance because of fraud. For payment of a premium will not be recognized where the insurer was induced to accept something of value upon a showing that the insured practiced fraud and deceit on the party crediting payment of premium.
>
> "*In the execution of a postdated check, however, and its acceptance, there is no fraud or deceit. There is the necessary implication of extension of credit on the part of the payee to the maker of the check.* There

is also the inference that the maker *has no funds in the bank with which to presently meet the sum named in the check, but that he will have the necessary money in the bank on the date of the postdated check.*" (Emphasis ours.)

Again in Kansas City Life Ins. Co. v. Davis, 95 F. (2d) 952-57, Circuit Judge Denman, in a concurring opinion, on page 959, states:

"*Unpaid premiums are not debts of the insured.* Payment is no more than the performance of a condition precedent to the continuance of the insurance. Hence the insured did not owe the company the $10.18 on the premiums payable on or before December 1, 1935. If, before January 1, 1936, the company had applied the $10.18, which it held subject to insured's order, to the premiums due on December 1, 1935, the grace period of 31 days would have extended the policy only to January 1, 1936. * * *

"The letter of January 29, 1936, after the company knew of the dishonored check, states to the insured that the premiums were paid 'to December 1, 1936.' He was therefore entitled to assume from the acceptance of the payment of past premiums after January 1, 1936, of his money, declared by the company to be held theretofore only 'to his order' *that the company has waived the nonpayment of the January 1st premium and continued the policy until he had time to repair the 'mistake' of the dishonored check.* Since he could assume it from the company's letter, *the company is estopped to deny it.*" (Emphasis ours.)

While perhaps the facts were not analogous to those herein, the principle and rule of law enunciated by him is applicable and applies to the questions involved. The language is plain, clear and convincing, and only reiterates what the courts have universally held, that an insurance

company may waive any condition of a policy inserted therein for its own benefit.

The Equitable Life Assur. Soc. v. Brandt, 240 Ala. 260, we quote from 134 A. L. R. at page 569:

> "Whether a transaction constitutes a payment depends upon the mutual intent of the parties manifested to each other. *That intent may be implied from acts and omissions to act.* When one tenders an amount as a payment, the intent of the payee to accept it as such must be inferred from his conduct with respect to it made manifest to the payor. If it is to be held for investigation, or pending the doing of something else, he should notify the payor at once. *If he retains it without expressing any dissent or condition,* it will be considered after a reasonable time *to have been accepted as tendered.* When that status once occurs *it cannot be altered except by mutual consent.*" (Emphasis supplied.)

Inasmuch as we will quote from Olga A. Martin vs. New York Life Ins. Co., supra, later on, we pass it at this time.

Williams vs. Emp. Liability Assur. Corp. of the Fifth Circuit, 69 F. (2d) 285, Circuit Judge Foster, speaking for the court on page 287, said:

> "(3) It cannot be said that on the record the evidence so clearly preponderated in favor of defendant that as a matter of law there was nothing for the jury. There was a conflict in the evidence as to whether Mitchell had agreed *that the check would be held to the* 15*th* before presentation. *This was a question for the jury.* There is little doubt, if any, that Mitchell had authority to grant his extension or that he had been held out to Williams as having that authority. If he did not have it, *he should have so told Williams* when commu-

nicated with on October 13th. *This was also a question for the jury.*"

IV.

It is a universal rule that courts never favor a forfeiture. This rule applies to the insurer which attempts to escape liability upon the ground of forfeiture for the non payment of life insurance premiums. In such cases, *slight evidence*, will support a finding that a waiver of the right of forfeiture has occurred.

The Knickerbocker Life Ins. Co. v. Phoebe A. Norton 96 U. S. 234 (24 L. Ed. 689)
New York Life Ins. Co. v. Eggleston, 96 U. S. 572 (24 L. Ed. 841)
Lincoln Nat. Life Ins. Co. v. Bastian (CCA4) 31 F. (2d) 859
Mass. Mut. Life Ins. Co. v. Mayo (CCA9) 81 F. (2d) 661
Mut Life Ins. Co. v. Chattanooga Sav. Bank, 47 Okla. 748, 150 Pac. 190.

ARGUMENT

It is a fundamental rule that courts never favor a forfeiture. This rule applies in a case where an insurer attempts to escape liability upon the theory of a lapsed policy or a forfeiture for non-payment of premiums. In such cases *very slight evidence* will suffice to support a finding that a waiver of a right of forfeiture has occurred.

The cases cited under this head, and other heads, nearly all treat or touch upon the questions ordinarily involved in dealing with insurance premiums, and especially where

postdated checks are concerned, and ever since the case of New York Life Ins. Co. v. Eggleston, supra, the courts have universally upheld the doctrine enunciated therein. Mr. Justice Bradley, speaking for the court reiterated the rule expressed in the Norton case, where on page 577, it declared:

> "We have recently, in the case of Knickerbocker L. Ins. Co. v. Norton, 96 U. S. 234 (24:689), shown that forfeitures are not favored in the law, and that courts are always prompt to seize hold of *any circumstances that indicate an election to waive a forfeiture*, or any agreement to do so on which the party has relied and acted. Any agreement, *declaration, or course of action*, on the *part of an insurance company, which leads a party insured* honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract. The company is thereby estopped from enforcing the forfeiture."

In the case of Lincoln Nat. Life Ins. Co. v. Bastian, 31 F. (2d) 859, the Fourth Circuit, speaking through District Judge Baker on page 861, quoted from 2 Joyce on Insurance, Sec. 2256, as follows:

> "A check, draft or note may be accepted under such circumstances as to clearly indicate that a payment of the premium was effected thereby, at least so as to continue the policy in force and preclude a forfeiture, and this is so held even though *said check, draft or note be not paid when due or be dishonored.*" (Emphasis added.)

and also reiterated the doctrine enunciated in New York Life Ins. Co. v. Eggleston, supra.

Likewise, this court, in Mass. Mut. Life Ins. Co. v. Mayo, 81 F. (2d) 661, upheld the doctrine thus enunciated, and that "the company had a right to waive this requirement, notwithstanding the fact that it had a legal defense to the policies."

Appellant Specification of Error 9

Appellant's requested instructions did not state the law applicable to the proven facts, in the case, and the court did not err in refusing to so charge the jury.

V.

The question of acceptance of the postdated check as payment of the insurance premiums, and the authority of the cashier so to do, were questions of fact for the jury to be inferred from circumstances in the case unless only one reasonable inference may be drawn therefrom.

New York Life Ins. Co. v. Lois Rogers (CCA9) 126 F. (2d) 784

Thomas v. Prudential Ins. Co. of America (CCA4) 104 F. (2d) 480

Mass. Trust Co. v. Loon Lake Copper Co., et al (CCA9) 4 F. (2d) 847

Omaha Woodman Life Ins. Co. v. Harry E. Krussman, etc. No. 10,007 decided October 20, 1942

Hockert v. New York Life Ins. Co. (Iowa) 276 N. W. 422

ARGUMENT

This court has recently held in New York Life Ins. Co. v. Lois Rogers, 126 F. (2d) 784, that it was for the jury to say whether or not it was the intent of the appellant company, to extend credit to the insured, for the payment

of the first premium, which was to be paid from commissions to be earned by the insured, and whether or not the agent had authority so to do. The court, on page 787, speaking through Mr. Justice Wilbur, said:

> "The company could likewise waive the stipulation in the application for insurance that only the president, a vice-president, a secretary or the treasurer of the company had authority to waive any of the company's rights or requirement, by authorizing other agents to make such waiver, and there was sufficient evidence *to go to the jury as to such waiver*, as above stated." (Emphasis supplied.)

Mr. Justice Haney, also reiterated the rule and approved it in Order of United Commercial Travelers v. Campbell, 115 F, (2d) 743, wherein it was stated in the following language:

> "It is the rule that the existence of a waiver depends upon the effect of the insurer's actions upon the insured, *not upon what the insurer intends.* If the *conduct of the insurer is such as to lead an ordinarily prudent insured person to believe that his protection continues* despite failure to comply strictly with the terms of the contract, the insurer is held to have waived his right to assert a forfeiture * * * " (Emphasis added.)

We believe, that the case of Hockert v. New York Life Ins. Co., 276 N. W. 422, is also applicable, which makes the finding of a jury conclusive and binding upon the court as to any disputed questions of fact, and on page 425, the following language supports that rule:

> "The finding of the trial court has the same effect as the verdict of a jury. It found that the check was

accepted in payment. *Its finding cannot be disturbed on appeal unless there was absolute lack of evidence to support it.*"

Again on page 426, the court continues:

"*Insurance policies are uniformly, and rightly, construed against the insurer.* That should not be interpreted thru the magnifying eye of a technical lawyer. Clearly in this case, the facts show that the New York Life Insurance Company accepted this $4.56 check in payment of the premium due."

In Martin v. N. Y. Life Ins. Co., 40 A. L. R. 406; 234 Pac. (N. M.) 673, heretofore cited under Points and Authorities III, it was held that where a worthless check is sent by the insured with which to pay a premium due upon a policy it may be accepted by the insurer as payment of such premium, and when so accepted, the right to declare a forfeiture for nonpayment of such premium is waived, even though such check is dishonored by the bank upon which it is drawn and that the delivery of an official receipt by the company acknowledging payment, *casts the burden upon the insurer to show that such check was not received as payment.* The trial Court in that case had granted a motion for a directed verdict, but the Supreme Court held it was a question of fact as to whether the check was accepted in payment *which should have been submitted to the jury and reversed the judgment.*

The appellees herein, in the trial of this case, in the lower court, made a prima facie case of payment, we believe, it then became incumbent upon the appellant to over-

come this prima facie case affirmatively, as was said in New York Life Ins. Co. v. Seifris, (CCA3), 46 F. (2d) 391, wherein the court approved the following instructions to the jury:

> "The burden, as I have said to you, under the facts of this case, due to the acknowledgement of the policy dates, rests with the insurance company to satisfy you by proof that it is clear and convincing that the premium was not paid."

The cashier for appellant testified that the Oregon Branch Office, in his charge, was in possession of the official receipts. According to both policies (Tr. pp. 20 and 28):

> "No person has any authority to collect a premium unless he then holds said official receipt."

The appellant has seen fit to make possession of the official premium receipts the basis of the agent's authority to collect premiums.

In New York Life Ins. Co. v. McJunkin, (Ala.) 149 So. 663. (1933), at page 667, we observe:

> "The stipulation for the receipt to be given the applicant was for the benefit of the applicant and may be waived."

Again in Bigalke v. Mutual Life (Mo.) 34 S. W. (2d) 1019, we find on page 1022, the following language:

> "Such a provision as this has, in its final analysis, no contractual force or affect whatsoever, *for the instant, an agent who is authorized to do so, accepts the premium* without delivery of an official receipt, the provision is waived. * * *"

Mr. Durham testified:

> "A. Well, I have charge of the office force. Our work is to collect premiums and transact different matters that come up with policy holders and with our agents." (Tr. p. 89.)

that he endorsed the postdated check for deposit to appellant's account; that he signed appellant's ex. 15p. 196 of the transcript, as, "Cashier of Oregon Branch Office". He also signed the appellant's supersedeas bond, on this appeal, (Tr. p. 69) as "Its Attorney in Fact". That in addition, he was custodian of appellant's official receipt, as aforesaid, which is usually mailed on receipt of checks in payment of premiums. Under these circumstances, can it be logically contended, that he had no authority to accept the postdated check, or to extend credit, in payment of premiums of an old policy holder? Defendant's Exhibit No. 12 (Tr. pp. 185-190) shows that Durham deposited to the credit of appellant's account in United States National Bank on November 18, 1940, checks in payment of premiums agregating the sum of $9,734.95, which was on Monday. The previous Saturday, on November 16, 1940, he likewise deposited checks in the sum of $6,261.37. A branch office doing this large volume of business, can it be said that it was not held out to the insured, and other policy holders, as the agency of the appellant, with full power and authority to transact all business in connection with the payment of premiums, and other matters relating

thereto? Could not the jury under these facts fairly and honestly find that a cashier in charge of such an institution, had authority to accept a postdated check from a good customer, in payment of his insurance premium?

The Oregon law relating to insurance companies and agencies, we will take up under the following.

VI.

The insurance policies or insurance contracts were made in Oregon. The Oregon law is applicable thereto, which we do not believe differs materially from the laws of its sister states of Arizona, Idaho and Washington, which have been interpreted by this court.

New York Life Ins. Co. v. Lois Rogers, supra.
Omaha Woodman Life Ins. Co. v. Krussman, et al, supra.
Hinkson v. Kansas City Life Ins. Co., 93 Or. 474, 183 Pac 24.
Rosebraugh v. Tigard, et al, 120 Or. 411, 252 Pac. 75.
Northwestern Mut. Life Ins. Co. v. Cohn Bros. (CCA9) 102 F. (2d) 74.
Sec. 101-505 O. C. L. A.

ARGUMENT

The learned Judge in denying the motion for a new trial rendered a supplemental memorandum (Tr. pp. 249-258.) in which he analyzes the facts in the case from his viewpoint, and theory of the case.

Among other things the Court submitted the question of Mr. Durham's authority to bind the appellant company, and also the question of the acceptance of the check to the jury. But complains the appellant:

"In this case, there is no evidence whatsoever that R. A. Durham had any authority to waive the requirements of the policy with respect to payment, or to agree that the company would accept the check as absolute payment of the premium. The evidence is entirely to the contrary and to the effect that he only accepted the check conditional upon its being honored when presented for payment." (Br. p. 54.)

In that regard, the court instructed the jury:

"The defendant claims that Mr. Durham, the cashier, had no authority to accept the check as payment, and I instruct you, gentlemen, that you must find as to that also before the plaintiff is entitled to recover; you must find as to whether Mr. Durham did have authority.

"If you find from all you have heard here that Mr. Durham had authority to bind the company by accepting the check as payment, then the plaintiff would be entitled to your verdict, if the defendant, acting through him, did, in fact, accept it as payment. But should you not find as to any one of those two things, the plaintiffs would not be entitled to recover. Did Mr. Durham have authority to bind the company, to accept the check as payment? Did he, in fact, acting for the company, treat the check as a binding obligation and accept it for the company as payment? I submit both of those questions (105) to you as questions of fact." (Tr. pp. 224-5).

This question involved an agent's authority, and we believe was fairly submitted to the jury by the court. The policies of insurance are Oregon contracts, and under the statutes of the State of Oregon appellant was, as a prerequisite, required to have an agency within the state duly licensed to carry on the business of insurance. Sec. 101-505 O. C. L. A.

The case of Hinkson v. Kansas City Life Ins. Co., 93 Or. 494, 183 Pac. 24, deals with the authority of agents of

life insurance companies, and the payment of premiums. On page 494 the court quotes 2 Joyce on Insurance, (2 Ed.) 439, as follows:

> " 'Any agent with general or unlimited powers, clothed with an actual or *apparent authorization, may either orally, or in writing, waive any written or printed condition in the policy*, notwithstanding such restrictions.' " (Emphasis added.)

It deals also with the ratification of unauthorized acts of the agents. The opinion therein is somewhat voluminous, but we believe when carefully analyzed, it interprets the insurance law with reference to these questions conclusively.

We find that the same court, in Rosebraugh v. Tigard, et al, 120 Or. 411, 252 Pac. 75, again reiterates the question of insurance agent's authorities to bind their principals and quotes the law enunciated by the United States Supreme Court in New York L. Ins. Co. v. Eggleston, supra, on page 422, the court, speaking through Mr. Justice Bean, concerning the authority of a local agent of an insurance company to waive conditions in policies, quotes from 14 R. C. L. Sec. 339:

> " 'The power of insurance agents to bind their principals is to be determined by the power they are held out by the companies *to the public as possessing*, and not by written instruments of appointment, of which the public could have no knowledge. It is accordingly held that an insurance agent, furnished by his principal with blank applications and with policies, duly signed by the companies officers, and who has been authorized to take risks, to issue policies by simply signing his

> name, to collect premiums, and to cancel policies and his knowledge is the knowledge of the insurer, notwithstanding any excess of his actual authority.' "

Again, on the same page, the court continues:

> "While the record may not show that Ryan exercised all the authority mentioned in the foregoing quotation, the rule that his authority is measured by what *he was actually held out to the members as having authority to do is equally applicable to him.*"

It also quotes from the case of Hardwick v. State Ins. Co., 20 Or. 547, 559, 26 Pac. 840, in which Mr. Justice R. S. Bean, writing the opinion, said:

> " 'Where insurance companies deal with a community through a local agency, *persons having transactions with the company are entitled to assume, in the absence of knowledge as to the agent's authority,* that the acts and declarations of the agent are as valid as if they proceeded directly from the company (Citing case.s And a person *who is clothed with power to act for them all,* is treated as clothed with authority to bind them as to all matters *within the scope of his real or apparent authority,* and persons dealing with him in that capacity *are not bound to go beyond the apparent authority* conferred upon him and inquire whether in fact he is authorized to do a particular act. It is enough if the act is *within the scope of his apparent authority.* * * This rule proceeds upon the theory *that if any party is to suffer by reason of the wrong-doing of such agent, it should be the company who clothed him with apparent authority* and for whom he was acting, rather than the assured, *who acted in good faith and innocently became a party to the contract.*' "

This is the law of this state. The Hardwick case was cited by the late Chief Justice Taft, while Judge of the Circuit

Court of Appeals, in the case of Greenwich Ins. Co. v. Waterman, 54 Fed. 839, 842.

The Oregon statutes relating to insurance companies, and authorities of agents, are ably commented upon, and analyzed by Circuit Judge Denman of this court, in Northwestern Mutual Life Ins. Co. v. Cohn Bros., 102 F. (2d) 74, which we will not set out here, as this involves several of the propositions that we have already discussed.

Appellant requested the court to instruct the jury (Br. p. 56):

> "You are instructed that ordinarily a check is not unconditional payment, but such payment is conditioned upon the check being honored when presented for payment, and in the absence of an agreement between the insured and the defendant to accept said check as unconditional payment the check does not constitute payment unless honored when presented for payment."

The above request was fully covered by the following instruction given by the court:

> "Ordinarily a check is given and accepted in business transaction *conditional on its being paid;* it is not payment as such; but in this case I submit to you as a question for your determination, under the facts of this case, *the check being dated a few days later than it was written, and under all the other facts in the case, whether there was a different intention on the part of both parties in this case*, and in view of your own business transactions where, as I say, a check is given and taken conditional on payment when it is presented. The plaintiff has the burden of proof as to that question. *She must satisfy you, by a preponderance of the evi-*

dence, to be entitled to your verdict, which means a greater weight of the evidence, that the check was given and accepted as payment of the premium, to be entitled to your verdict; and unless you are so satisfied by a preponderance of the evidence *as to the intention of the parties—that means both parties—then your verdict must be for the defendant.*" (Tr. p. 222.)

The court further instructed the jury, as follows:

"But that would not be enough to entitle the plaintiff to recover. You must consider also the defendant's point of view. *There must be a meeting of the minds*, as Mr. Davis said, *before the plaintiff would be entitled to recover. Did the defendant treat the transaction the same way? Under all the circumstances of the case*, did they treat this check differently than the ordinary check, which, as I say, is given and taken conditional on its payment? When they laid the check aside, as apparently they did for a few days, and thereafter put it through for deposit on the next business day after its due date, *was it the intention of the defendant in thus dealing with the check treat that as payment;* by that I mean to treat that as a binding obligation given to them by Mr. Miller, which they could enforce in the way that all obligations are enforced? If both the giver of the check intended it to be as payment and intended to create a binding obligation on him, and if the receiver of the check, the defendant, treated the transaction the same way, that the check was a binding obligation and could be enforced, and there was a meeting of the minds on that, then that would be payment by the check and that would entitle the plaintiffs to recover in this case, should you so find from a preponderance of the evidence." (Tr. pp. 223-224.)

The court correctly instructed the jury that there must be a "Meeting of minds", which could only be interpreted to mean one thing, and that is, that the appellant and the insured understood each other, and this may be inferred

from the proven acts and circumstances in the case. The verdict of the jury found, that there was a meeting of minds, and set the matter at rest.

We again refer to Equitable L. Assur. Soc. v. Brandt, 240 Ala. 260, 198 So. 595, 134 A. L. R. 555. While this case was reversed upon other grounds, nevertheless, we believe that the reasoning in the opinion clearly sustains the conclusion reached in the instant case. We quote from page 569:

> "The mutual assent must be manifested by each party to the other, and except as so manifested it is unimportant. Secret intent is immaterial, only overt acts are considered in determining such assent. The fundamental basis of a contract at common law is reliance on an outward act constituting a promise. *Assent need not be expressed in words. But both acts and words have the meaning which a reasonable person would put upon them in view of the circumstances known to them.* Any conduct of one party from which the other may reasonably draw the inference of a promise is effective in law as such. See the discussion in 1 Williston on Contracts, Revised Edition, sections 22 and 22-A, pages 41 to 44."

Again on the same page, we continue in the following language:

> "Whether the payee acted with due diligence and in a reasonable time to notify the payor *is a question of fact for the jury to be inferred from the circumstances*, except where only one reasonable inference may be drawn from them."

Concluding on page 570, we find this significant language:

> "The question of whether insured had a right to believe and did believe as a reasonable man that his check of January 28, 1936, had been accepted by the insurer *in the absence of any notice to him* whatever in respect to it until he died on February 3, 1936, is not one of law, *but an inference of fact for the jury.* The affirmative charge should not have been given as to it for the plaintiff, nor the defendant either. We will not examine closely the rulings of the court in this respect."

A perusal of the requested instructions of the appellant herein, together with the instructions given by the court, will convince the most skeptical, that the law applicable to the proven facts was clearly given in the charge to the jury. The appellees' theory, and their contentions were restricted, and the charge is much more favorable to the appellant than it had a right to expect, under the circumstances and facts. The court applied the law applicable thereto, and we maintain that there was no error.

The question of the motion for a directed verdict and the motion for a new trial are covered under our other points and authorities. We feel that it would unduly extend these pages if we discussed these matters in greater detail.

VII.

Under the statutes of Oregon, appellees are entitled, when a case is appealed to the Supreme Court, and the judgment is affirmed, an additional attorney fees.

Sec. 101-134 O. C. L. A.

Purcell v. Wash. Fid. Nat. Ins. Co., 146 Or. 475, 30 P (2d) 742
State ex rel v. Employees' Hospital Ass'n, 157 Or. 618, 73 P (2d) 793
Horwitz v. New York Life Ins. Co. (CCA9) 80 F. 295

ARGUMENT

Appelles alleged in their complaint that the sum of $1,500.00 was a reasonable sum to be allowed the plaintiffs as attorney fees, in their first cause of action, and that $1,000.00 was a reasonable sum to be allowed plaintiffs as attorney fees under their second cause of action. (Tr. pp. 8 and 12.) The jury in the court below allowed the sum of $1,000.00 which was entered as a part of the judgment therein.

Section 101-134 O. C. L. A., among other things, provides:

> "If attorney fees are allowed as herein provided, and on appeal to the Supreme Court by the defendant, the judgment is affirmed, the Supreme Court shall allow to the respondent such additional sum as the court shall adjudge reasonable as attorney fees of the respondent on such appeal."

This provision has been interpreted by this court in Horwitz v. New York Life Ins. Co., supra, wherein this court held in passing upon this question, Mr. Justice Denman, speaking on page 302:

> "The rules of the district court adopted the law of Oregon with reference to court costs. Such a provision of the Oregon law, by way of costs, is an incident of the remedy and is controlled by the law of the forum.

(Omitting citations.) The insured is entitled to a decree for an amount of attorney fees to be fixed by this court which has finally treated the issues."

CONCLUSION

The appellees respectfully conclude that the trial court, did not err in admitting the testimony over the appellant's objection. That it fairly and correctly submitted the questions of fact involved to the jury, and that the evidence sustains the verdict of the jury, which sets the matter at rest, and appellees maintain that the judgment of the district court should be affirmed. That they be allowed such sum as the court may adjudge reasonable as attorney fees herein.

Respectfully submitted,

GEORGE NEUNER,
Masonic Building,
McMinnville, Oregon,
GEORGE WM. NEUNER,
Supreme Court Building,
Salem, Oregon.
Attorneys for Appellees.